(2)

No. 86-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[The proceeding before the Court, commenced by a Rule 60(b)(6) motion in 1984, is the second collateral attack by plaintiff Margoles on a 1976 judgment of dismissal (by District Judge Warren) which had been affirmed by the Court of Appeals and as to which this Court had denied certiorari. 587 F.2d 885 (7th Cir. 1976, pub. 1978), *cert. denied*, 430 U.S. 946 (1977). The first collateral attack, a Rule 60(b)(4) motion filed in 1980, was denied, in a decision (by District Judge Evans) affirmed by the Court of Appeals and as to which this Court denied certiorari. 660 F.2d 291 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). Margoles seeks again, in this second collateral attack, to void the 1976 judgment on the ground he was denied due process because the district judge who ordered the case dismissed in 1976 had not recused himself.]

There is no issue for review on certiorari. The only question, an evidentiary one, is:

1. Whether the Court of Appeals erred in holding that the District Court (Judge Evans) did not abuse its discretion in denying petitioner's Rule 60(b)(6) motion.

RULE 28.1 LISTING

Respondent, The Journal Company, is a corporation ninety percent owned by an employee trust and the balance by several family trusts. It is now known as Journal Communications, Inc. through a corporate change of name effective January 1, 1987. It has no subsidiaries other than wholly owned subsidiaries and is not affiliated with any other company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the Court of Appeals, reported at 798 F.2d 1069, is set forth in the appendix to the petition, pp. A-1 through A-12. The Decision and Order of the district court, not reported, is set forth at pages A-15 through A-20 of the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1986 (A-13) and Petitioner's motion for rehearing by that Court was denied by order entered November 17, 1986. (A-14) Petitioner sought and obtained from this Court an extension of time to file his petition. The petition filed within that time was returned by the Clerk for non-compliance with Rule 33 and the petition was re-filed on or about April 7, 1987.

STATEMENT OF THE CASE [1]

Original Case (1972-1977)

Margoles' complaint was filed on August 18, 1972.[2] It claimed allegedly slanderous telephone conversations between the defendant, Alida Johns, and members of the staff of United States Congressman McClory in August-September, 1970. The defendants denied that any of the allegedly slanderous statements were made and denied all other material allegations.

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[1] Petitioner's Statement contains numerous assertions and argumentative conclusions not supported by the record or the decisions below. Respondents therefore submit their summary of the original proceedings in this case (1972-77), the first collateral attack proceedings (1980-81), and the second collateral attack below which led to the current petition. Elsewhere in this brief specific response will be made to the argument in petitioner's Statement.

[2] Margoles had filed a predecessor case containing the same allegations in the District of Columbia in 1970. That case was dismissed on jurisdictional grounds. *Margoles v. Johns*, 333 F.Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973).

After status conferences had been held before Judge Reynolds in April and in December, 1973, Margoles moved that Judge Reynolds recuse himself in June, 1974. Subsequently, without any ruling on the recusal motion, this case was one of those transferred to Judge Robert W. Warren upon his appointment to the bench in October, 1974.

The parties first appeared before Judge Warren at a pre-trial conference on April 25, 1975. Margoles' then-attorney, Mr. Giampietro, in the language of his current counsel, Perry Margoles, "expressed Margoles' concern about, and inquired" as to whether Judge Warren's having been Wisconsin Attorney General when the department he headed was in an adversarial role to Margoles would affect his ability to be impartial. Judge Warren said he had not had such contact with any Margoles matters as would cause a problem, disclaimed any bias, and did not disqualify himself. [Opinion of District Court, February 25, 1981; set forth in *Margoles v. Johns*, 660 F.2d 291, 293 (7th Cir. 1981)]. Margoles said nothing further about the matter in any proceeding before Judge Warren.[3]

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[3] While it is not an issue here, Margoles' claim (Petition, p. 6) that he could not have brought a disqualification motion against Judge Warren in 1974-76 because he had already moved against Judge Reynolds, is incorrect. 28 U.S.C. § 144 only bars filing more than one incontestable affidavit of prejudice. Challenges to judicial bias can arise not only on motions under § 144, but also on motions brought solely under 28 U.S.C. § 455 [e.g., *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977)], on motions purporting to be under § 144 even when procedurally improper [*Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980)], and on motions which are related to no particular authority whatever beyond the desire of the movant to be rid of the sitting judge [*United States v. Sciuto*, 531 F.2d 842 (7th Cir. 1976)]. It

(Footnote continued on following page)

Judge Warren dismissed the case on January 8, 1976, for Margoles' willful disobedience of discovery orders. Margoles then filed his first Rule 60(b) motion (not on the ground of judicial partiality, but on other grounds), which the trial court denied, and he then appealed from the judgment of dismissal and the order denying the Rule 60(b) motion. The Court of Appeals affirmed. *Margoles v. Johns*, 587 F.2d 885 (7th Cir. 1976, reported in 1978).

After the Court of Appeals had ruled, Margoles' son, Perry Margoles, substituted as plaintiff's attorney and has continued to represent his father in all subsequent proceedings in this case. Margoles moved for a rehearing, which the Court of Appeals denied. This Court denied Margoles' petition for certiorari, 430 U.S. 946 (1977), and his petition for rehearing, 432 U.S. 926 (1977). Margoles did not raise any issue concerning Judge Warren's refusal to recuse himself either in his first Rule 60(b) motion or in any of those appellate proceedings.[4]

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[3] *continued*
would seem to be a truism that if, as Margoles claims, he now has a right, long after judgment, to claim prejudice because of Judge Warren's presence in the case, he had that same right ten years ago.

[4] Margoles claims (Petition, p. 7) he did not appeal Judge Warren's refusal to recuse himself because the Seventh Circuit did not allow writs of mandamus to review recusal issues, citing *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977). In *SCA Services*, noting the historic inapplicability of mandamus to review § 144 motions, the court issued a writ to compel withdrawal of a district judge under 28 U.S.C. § 455. Although not in issue here, Margoles had that right in 1975 and failed to exercise it. *See, e.g., In re I.B.M.*, 618 F.2d 923 (2nd Cir. 1980); *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965). He also could have included his challenge to Judge Warren in his first Rule 60(b) motion and in his subsequent appeal, but failed to do so.

First Collateral Attack (1980-1981)

Over three years later, in July, 1980, Margoles filed his second Rule 60(b) motion which Judge Warren assigned to Judge Evans. Margoles now claimed that he had been denied due process and that the 1976 judgment was void under Rule 60(b)(4), because, he alleged for the first time, Judge Warren should have disqualified himself in 1975 when Margoles raised his question about impartiality at the pretrial conference. His motion was based on forty-three exhibits attached to the affidavits of his son and attorney, Perry Margoles. Most of the "evidence" on which he based his motion had been known to him prior to the entry of Judgment in 1976. Only ten of the forty-three exhibits arguably had come to his attention after that date. [Opinion of District Court, February 25, 1981; set forth in *Margoles v. Johns*, 660 F.2d 291, 301 (7th Cir. 1981)].

Margoles' attack on Judge Warren in 1980 was based on the fact that the office of the Attorney General of the State of Wisconsin, as legal representative of the State, had represented the public defendants in two lawsuits Margoles had brought against the State's Board of Medical Examiners and others.[5] Warren did not personally handle

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[5] One of these suits involved Margoles' third unsuccessful application for reinstatement of his Wisconsin medical license, *see, Margoles v. Wisconsin State Board of Medical Examiners*, 47 Wis. 2d 499, 177 N.W.2d 353 (1970), a license which had been revoked in 1962. *See, State v. Margoles*, 21 Wis. 2d 224, 124 N.W.2d 37 (1963).

The second of these suits, filed in the United States District Court for the Western District of Wisconsin, is the one Margoles describes as his "first defamation" action (Petition, p. 4) to liken it to this case. In fact, while Margoles was also plaintiff in the Western District suit (the defendants were different, of course), and slander was also alleged, there was a wide range of different

(Footnote continued on following page)

either case. (*E.g.*, Pl. Exs. 17, 35, 37) Judge Evans ". . . carefully reviewed the documentation submitted by Dr. Margoles . . . and [found] it far short of the kind of evidence necessary for him to even get a hearing, let alone carry the day. . . ." He "examined the materials and concluded that they do not demonstrate any lack of impartiality on the part of Judge Warren." *Id.* at 301.

Judge Evans further held that even if, instead of the due process issue raised by collateral attack, the issue of recusal was being initially and directly examined, Judge Warren had no duty, under the facts of record, to recuse himself under the federal recusal statute, 28 U.S.C. § 455, either in its amended or pre-amendment form.

The Court of Appeals affirmed the District Court's denial of the second Rule 60(b) motion and adopted the District Court's decision as its opinion. *Margoles v. Johns, et al.*, 660 F.2d 291 (7th Cir. 1981). This Court denied Margoles' petition for certiorari. 455 U.S. 909 (1982).

Second Collateral Attack (1984-1987)

On January 5, 1984, Margoles filed his third Rule 60(b) motion. The forty exhibits (numbered B-1 - B-40) attached

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[5] *continued*
issues in the two cases. The Western District case included claims of civil rights violations, conspiracy, and denial of due process by a state board. The alleged "common" issue, slander, related to conversations between entirely different people at times and places widely separated from the slander alleged in this case. The decisions in the Western District case were based principally on statute of limitations, governmental immunity, and conspiracy issues. *See Margoles v. Ross*, 67 F.R.D. 666 (W.D. Wis. 1975); *Margoles v. State Board of Medical Examiners*, 446 F.Supp. 959 (W.D. Wis. 1978), *modified*, 588 F.2d 832 (7th Cir. 1978); *Margoles v. Tormey*, 643 F.2d 1292 (7th Cir.), *cert. denied*, 452 U.S. 939 (1981).

to Perry Margoles' affidavit which accompanied the motion in large part relate to Margoles' document disputes with the Wisconsin Attorney General's office (then headed by Attorney General Bronson LaFollette) in his Western District litigation in 1979 (Pl. Exs. B-14 - B-23) and to extra-litigation disputes with that office under the Wisconsin Open Records Law in 1983. (Pl. Exs. B-24 - B-40). Margoles also re-incorporated in his motion Exhibits 1-43, the same exhibits used for his second Rule 60(b) motion denied in 1981. Indeed, the bulk of Margoles' latest motion, in 1984, paragraphs 8-19, was a verbatim repetition of the same argument and "evidence" which had been in his rejected motion in 1980.

Margoles claimed his current motion is also based on "new evidence."[6] That material consists of some documents which show that an assistant attorney general had some "communication" with counsel for Respondents relating to the instant case and to the Margoles suit then pending in the Western District. (See, note 5, *supra*) Those documents also show that another person in the office of the Attorney General had had conversations concerning Margoles with James Wieghart, who was at the time of

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[6] Petitioner refers to Wisconsin's "newly enacted" open records law as enabling him for the first time to see certain state records. (Petition, p. 10) Any suggestion that this means of obtaining access to public records first became available to Margoles after January 1, 1983 is not correct. The "new" law, except for some new procedures, penalties and a few exceptions, by its own terms continued the pre-existing substantive law. Sec. 19.35, Wis. Stats. (1984). Under that pre-1983 law, records in the custody of a public custodian were equally open to inspection. Section 19.21(2), Wis. Stats. (1979), provided that except as "expressly provided otherwise", public records could be examined or copied by "any person", and the public policy of the State strongly favored inspection. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470 (1965).

one of those conversations a reporter in the employ of the Journal Company. Those conversations occurred in 1965 (when he was not employed by the Journal Company) and 1968, respectively seven and four years prior to the commencement of this lawsuit, and prior to the time Judge Warren became Attorney General of the State of Wisconsin (January 1, 1969).[7] Margoles asserted that these communications show a "relationship" between the Respondents and Judge Warren which disqualified Judge Warren from the case.

In his Decision of January, 1985, affirmed by the Court of Appeals, Judge Evans reviewed the materials upon which the current motion is based. (A-17 - 18) He found the disparity between the "serious accusations hurled indiscriminately" at court and counsel and the lack of evidence supporting such charges to be "incredible" and held Petitioner's showing was "insufficient." (A-18)[8]

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[7] Petitioner's observation (Petition, p. 11) that the second of these two conversations occurred "after the election in 1968 of Warren as Attorney General" might be literally correct, depending on the time of day, because the conversation occurred on November 5, 1968 (Pl. Ex. 14), which was election day that year. However, the contact did not occur during the term of Judge Warren as Attorney General. He did not assume the position of Attorney General until January, 1969.

[8] In the second Rule 60(b) proceedings, in 1980-1981, the trial and appellate courts found, as Judge Warren himself had stated, that as Attorney General he had not had such contact with Margoles matters as would create any problem, and that Margoles' "evidence" of Judge Warren's knowledge and involvement in Margoles matters was inadequate. *See*, 660 F.2d at 293, 298, 300, 301. Petitioner's argument to the contrary in the current proceeding is based solely upon precisely the same exhibits and contentions he presented then and even to this Court. *Compare*, Current Petition, p. 4, n. 3, *with* Petition in No. 81-967 (Nov. 21, 1981), p. 5.

The Court of Appeals affirmed. The Court stated it had "thoroughly examined the documents underlying the plaintiff's motion"[9] and "concluded that these documents neither compromise Judge Warren's decision not to disqualify himself, nor impugn the justness of the proceedings leading to the dismissal order." (A-8 - 9) The Court determined Petitioner's "evidence" to be "either totally inconclusive" or "patently innocuous" (A-19) and "woefully inadequate to warrant relief under Rule 60(b)(6)." (A-11)

REASONS WHY THE WRIT SHOULD BE DENIED

This case presents no issue warranting review by this Court on certiorari. The Court is being asked to reexamine facts which Petitioner asserts demonstrate denial of due process but which the courts below have carefully examined and found to be without merit.

This case is of no interest to any one other than the litigants. It raises no new, interesting or controversial legal issues and presents no special or important reason why this Court should accept it for review.

Shorn of the extravagant hyperbole of Petitioner, this case merely reasserts Margoles' skewed perception of judicial partiality which was expressly denied by the original district judge in 1975, was determined meritless by another

[9] Petitioner apparently overlooks this description by the Court of its efforts when he accuses the Court of "omitting and fundamentally changing the primary issues, exhibits, and standards of review" (Petition, p. 17) and of having "analyzed only [a] secondary exhibit, out of context . . . ." (*Id.* n. 5a)

district judge and the appellate court in 1980, and was again found to be baseless by the courts below in the current proceedings. Those findings were based upon a thorough and careful review of Petitioner's "evidence."

The petition raises no valid legal issues but only evidentiary questions. The issue in a collateral attack brought on the grounds urged by Petitioner is whether he was in fact denied due process. The decisions below correctly determined that Petitioner's concerns were factually baseless. There is no conflict of decisions on any issue presented by this case, and it presents no important question of law requiring decision by this Court.

I.

ISSUE BELOW WAS FULLY CONSIDERED

In spite of the facial baselessness of Margoles' attack, Margoles' "evidence" of misconduct or judicial partiality was fully considered below. Margoles had liberal opportunity to present his case: the Court of Appeals considered (and denied) his petitions for mandamus to Judge Evans and for reconsideration (and for expedition of the other petitions) which immediately preceded his appeal; granted his motion for an extension of time to file his appellant's brief; granted his motion to file a supplemental brief; granted his motion to transcribe the recording of oral argument; granted his motion to file a post-oral argument supplemental brief; and granted his post-judgment motion for an extension of time to petition for rehearing. Petitioner was given more than his day in court.

The Court of Appeals assessed Margoles' "evidence" against the correct standard. Margoles incorrectly argues (Petition, p. 17) that the Court of Appeals "misstated the applicable criterion for disqualification," citing a footnote to the Court's decision in which the Court expressed dis-

agreement with one element of Margoles' argument that relief here was appropriate upon a showing of a mere appearance of partiality. (A-11, n. 11)[10]

While the Court did by footnote dispose of the contention that appearances alone were sufficient in this collateral attack on a judgment, the entirety of its consideration and rejection of Margoles' claim was responsive to his contention that Judge Warren was in fact biased and unable to afford Margoles fairness and due process. It was Margoles' "evidence" offered in support of these allegations that the Court found "woefully inadequate." (A-11) The Court was considering and applying correctly the standard of Rule 60(b)(6) when it expressly held:

> "The plaintiff clearly has failed to demonstrate extraordinary circumstances that create a substantial danger of an unjust result." (A-11)

II.

ISSUE BELOW WAS CORRECTLY DECIDED

A. The Correct Standard Of Review Was Applied

Margoles accuses the Court of Appeals of "omitting and fundamentally changing the . . . standards of review" to be applied in this case. (Petition, p. 17) In fact the Court applied correctly the standard adopted in every federal circuit. The Court held its duty on review of the denial of a Rule 60(b)(6) motion is to "determine only whether the district court abused its discretion in denying the"

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[10] Although he professes otherwise to this Court (Petition, pp. 18-19), Margoles had made that argument below (See, App. Br. at 22-24) and had cited numerous cases in which the issue of judicial recusal had arisen on direct review rather than by collateral attack on a judgment. (See, Appellees' Br. at 21-23).

motion. (A-6) That standard of review is applied in like cases throughout the entire federal appellate system.[11] In the Seventh Circuit, this standard is articulated as requiring for reversal a finding that "no reasonable person could agree with the district court's decision." *E.g., Tolliver v. Northrop Corp.*, 786 F.2d 316, 318 (7th Cir. 1986). In the case at bar and upon Margoles' showing, no reasonable man could fail to agree with the district court's decision. Indeed, the Court of Appeals went beyond the accepted standard to make it clear that there was no evidence which supported Margoles' position. (A-9 - 11)

B. There Is No Evidence Justifying Relief From The Judgment

Rule 60(b)(6), Fed. R. Civ. P., authorizes the vacation of a judgment "for any reason [other than those specified in subsections (1) - (5)] justifying relief from the operation of the judgment." Petitioner asserts, as the reason justifying relief, that Judge Robert W. Warren was party to "an extraordinary judicial relationship" (Petition, p. 26) with counsel for Respondents while he served as Attorney General of Wisconsin (1969-1974).

In 1975, Judge Warren disclaimed any knowledge of Margoles matters that would prevent him from sitting in

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[11] *E.g., Manning v. Trustees of Tufts College*, 613 F.2d 1200 (1st Cir. 1980); *Matter of Emergency Beacon Corp.*, 666 F.2d 754 (2nd Cir. 1981); *Ross v. Meagan*, 638 F.2d 646 (3rd Cir. 1981); *Transportation, Inc. v. Mayflower Services, Inc.*, 769 F.2d 952 (4th Cir. 1985); *Roberts v. Rehoboth Pharmacy, Inc.*, 574 F.2d 846 (5th Cir. 1978); *Smith v. Secretary of Health & Human Services*, 776 F.2d 1330 (6th Cir. 1985); *Slater v. KFC Corp.*, 621 F.2d 932 (8th Cir. 1980); *United States v. Sparks*, 685 F.2d 1128 (9th Cir. 1982); *Security Mutual Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062 (10th Cir. 1980); *Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984); *Harjo v. Andrus*, 581 F.2d 949 (C.A.D.C. 1978).

this case. In 1981, the Court of Appeals, after careful review of the record, agreed and found no evidence of such knowledge. *Margoles v. Johns*, 660 F.2d 291 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982). In the current motion, Margoles has offered very little new evidence and no evidence of any such knowledge.

Confining attention to his "evidence" not already found inadequate several years ago, Margoles' intemperate assertion is based entirely upon: (1) three brief letters in February and March, 1974 between an assistant attorney general of Wisconsin, Sverre Tinglum, and one of Respondents' attorneys, James P. Brody, relating to Mr. Brody's request for and receipt from Mr. Tinglum of some public materials from Margoles' pending civil rights case (Exs. B-5 - 7); (2) a letter written one year later from another assistant attorney general to Wisconsin Attorney General LaFollette (Judge Warren having resigned his office to assume the federal bench in October, 1974) suggesting that Sverre Tinglum, having since gone into private practice, should be retained specially to continue his representation of the State Board of Medical Examiners and noting, in a list of numerous other of his activities, that Tinglum had been "maintaining communications with the attorneys for the Milwaukee Journal Company" (Ex. B-1); and (3) evidence that another assistant attorney general, LeRoy Dalton, had had two telephone conversations concerning Margoles in 1965 (Exs. B-8 - 9) and one in 1968 (Ex. 14) with a James Wieghart. Wieghart was a *Sentinel* reporter in 1968; Judge Warren was not yet Attorney General. In 1965, Wieghart was not a reporter but was in Washington, D.C. as a senator's press secretary and later a legislative staff person. (Aff. of Robert Wills of Feb. 1, 1984, ¶¶ 4-5) [Margoles knew of these conversations, but did not refer to them, when he filed his Rule 60(b)(4) motion in 1980. (*See*, Exs. 14, B-22)]

That "evidence" prompted Judge Evans to express:

> Incredible as it is, considering the mountain of paper and the serious accusations hurled indiscriminately at [court and counsel], that is *all* his entire motion rests on. (A-18) (original emphasis)

Margoles has offered no evidence that the office of the Attorney General of the State of Wisconsin, let alone Attorney General Warren, received any evidentiary information concerning Margoles from Respondents or their counsel. There is no evidence that that office learned from counsel any information which conceivably could cause Judge Warren to be biased or even to have any knowledge of the instant case even if Judge Warren personally had been aware of the communications which did occur.

The "information" exchanged was of public record in any event and was innocuous, as noted by the court below. (A-9 - 11) Margoles' exhibits show that from Mr. Brody, assistant attorney general Tinglum asked for and learned in March, 1974 that a status conference had been scheduled in this case and that a trial in that calendar year was unlikely. (Ex. B-7) From Mr. Tinglum, Mr. Brody received a copy of the pleadings filed in Margoles' civil rights action against the State Board of Medical Examiners and employees, copies of some depositions taken in that case, and copies of written communications with the Illinois Medical Examining Board. (Ex. B-5) Margoles cannot and does not claim that those documents were anything but innocuous, but he seeks to draw unwarranted inferences that they evidenced a close working relationship.

It is, as Judge Evans expressed, "incredible" that Margoles would base his extravagant allegations upon such a minor and routine professional courtesy.

Most important, there is not a sliver of evidence that Judge Warren personally knew of any of these matters. Wisconsin's Attorney General is elected to office and is the senior official of the Wisconsin Department of Justice. That Department is responsible for providing to the state an array of legal services, both civil and criminal, statewide law enforcement, and criminal investigations. Chapter 165, Wisconsin Statutes (1969, 1985) The office of the Attorney General during the years Judge Warren held that office had almost 500 employees and, at any one time, presented and defended literally thousands of cases. *Margoles v. Johns*, 660 F.2d 291, 301 (1961), citing *In Matter of Searches*, 497 F.Supp. 1283 (E.D. Wis. 1980). It is therefore not surprising that Judge Warren has, as a matter of uncontroverted record in this case, stated that he had not had such contact with any Margoles matters as would cause a problem and has affirmatively disclaimed any bias. *Id.*, 660 F.2d at 293.

Margoles cites *Aetna Life Insurance Co. v. Lavoie*, ____ U.S. ____, 106 S. Ct. 1580 (1986) (Petition, pp. ii, 26), although the large extracted portion in his petition actually combines out of context language from *In re Murchison*, 349 U.S. 133 (1955) with *Withrow v. Larkin*, 421 U.S. 35 (1975) and includes within the quoted reference language which in fact is his own. That case demonstrates only the significant and substantive difference between this case and cases in which judicial conduct has in fact jeopardized due process of law. In the *Aetna Life* case, the district judge's direct personal financial stake in the outcome of the case constituted the perceived deprivation of due process. The facts of this case are not remotely analogous. Unlike *Aetna Life*, this case does not arise on direct review of a failure to recuse but is a collateral attack on a judgment and the facts of this case show there

was no "probability of actual bias", as both courts below have confirmed. *See, Withrow v. Larkin, supra,* 421 U.S. at 47 (1975).

Margoles rests heavily on the letter referenced above in which an assistant attorney general in 1975 said that assistant attorney general Tinglum and Journal Company counsel had had communication, now calling it his "principal exhibit." He criticizes the Court of Appeals for not mentioning it. (Petition, p. 17) The Court of Appeals was well aware of the letter—Margoles argued it in his briefs and in his Petition for Rehearing to that Court. Understandably, the Court considered it of no significance. The record already shows, and it was recognized in the opinion, that there had been some "communication." But as demonstrated by the record, it was innocuous communication. Yet Margoles is willing to leap from that innocuous communication to exaggerated charges.

His characterization of these communications as "spanning several years" (Petition, p. 27) exaggerates isolated events without basis. The three letters between Brody and Tinglum, which the Court found to be of no significance, were written in 1974. The only other "evidence" of this case having received attention by anyone in the Attorney General's office are two handwritten notes from the records of that office, one affixing a copy of a newspaper story on the commencement of this suit in 1972 (Ex. B-4) and noting the name of defense counsel, and the other containing notes of the damages asked, the appellate status of, and the names of the attorneys involved on both sides of the slander case initiated earlier against these same parties by Margoles in the District of Columbia. (Ex. B-3) *See,* note 2, *supra.*

The three telephone conversations noted above between James Wieghart and assistant attorney general LeRoy

Dalton in 1965 and 1968 all occurred before Judge Warren was Attorney General. None, at least as far as is known or is shown on the record, had anything at all to do with any matter subsequently involved in this lawsuit. (See, Exs. 14, B-8, B-9)

Even if Judge Warren had been personally aware of these matters, there would be no basis for arguing that he was prejudiced or judicially incapacitated by them. The Court below so found. (A-10 - 11) But Margoles goes even further and argues that his "evidence" proves that Judge Warren had an "of counsel" relationship with Respondents and a "substantial interest" in this matter in violation of 28 U.S.C. § 455. (Petition, pp. 12 n. 2, 28) This specious contention was rejected by both the district and the appellate court in resolving Margoles' first collateral attack. 660 F.2d at 299. The Court of Appeals in this case reiterated that Margoles' claim that Judge Warren was "of counsel" to Respondents' counsel was "groundless" and his claim that Judge Warren had a "substantial interest" in the case was "totally unfounded." (A-11)

To overcome the absence of evidence of judicial impropriety, Margoles has constructed a confusing pile of events taken out of context or chronology, and unreasonable, pyramided speculations, from which he draws suspicions of conspiracy and exaggerated, baseless conclusions.

Margoles complains that the Wisconsin Attorney General's office "barred" him from seeing certain files in 1979, citing two paragraphs (par. 18, 19) of his motion in this proceeding, which in turn reference exhibits cited in the previous appellate round in this case. It is noteworthy that in paragraph 18 Margoles acknowledges that the Court in the Western District case (Margoles' suit against the Board of Medical Examiners) supported the Attorney General's refusal to give access to certain files by deny-

ing Margoles' motion to produce. Margoles also complains that the Attorney General refused access to some of his files under the Open Records law in 1983. (Petition, p. 11) It should be pointed out that whatever action the Attorney General's office took with regard to those two matters has not been the action of these Respondents, or of Judge Warren, but of the Attorney General's office under Bronson LaFollette, successor to Attorney General Warren, and were not part of the instant case.

C. No Duty To Disclose Exists Or Was Breached

Margoles argues that there was a duty of disclosure here, which was breached, (Petition, pp. 20-25) and he urges engrafting onto the standards of judicial ethics the disclosure requirements for arbitrators. (Petition, p. 20) That suggestion is misplaced in this collateral attack. The Judicial Canons and 28 U.S.C. § 455 provide adequate safeguards. In any event, Margoles' proposal would be limited to the disclosure of "circumstances which reasonably could require disqualification of the judge." (Petition, p. 23 n. 7) It has been determined repeatedly in this case that such circumstances did not exist.

Obviously where there is nothing to disclose, there can be no duty to "disclose".

D. There Was No Reason For Judge Evans To Recuse Himself

Margoles asks, (although he does not state it to be the fact), whether he was denied his right to "an impartial judge" in 1984 because Judge Evans did not recuse himself. (Petition, pp. ii, 13-14)

The suggestion that Judge Evans should have recused himself has no support in fact and, as the Court of Ap-

peals said, is ". . . completely without merit. . . ." (A-5, n. 3) One point should be noted. Characteristically, Margoles suggests significance in the fact that one of Respondents' counsel, James P. Brody, was one of the attorneys for Judge Warren in *Steinle v. Warren*, 582 F.Supp. 1537 (1984), 765 F.2d 95 (7th Cir. 1985). (Petition, p. 14) (Judge Evans was not the judge in that case.) Mr. Brody was retained in that case in late 1983, more than seven years after Judge Warren had last sat in this case, and at a time when one could reasonably have concluded that this case was over, this Court having denied Margoles' petition for certiorari for the second time over one year earlier. The judgment for costs and fees awarded against plaintiff Steinle in that case was assigned by Judge Warren to the United States of America which had undertaken his representation. *See, Steinle v. Warren, et al.* and *United States of America v. Steinle,* defendant, and *All Title Services, Inc., et al.,* garnishee defendants (E.D. Wis., No. 83-C-1840).

III.

THERE IS NO FIRST AMENDMENT ISSUE IN THIS CASE—COSTS WERE PROPERLY ASSESSED

Margoles' claim that the imposition of costs against him for filing a frivolous appeal violates his First Amendment right to petition is without merit and is contrary to recent decisions of this Court. Characteristically, Margoles cites the concurring opinion of Justice Brennan in *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787 (1985), for a general principle of little direct bearing on this case (Petition, p. 19) but ignores both the holding of the Court in that case and an earlier decision of this Court which dispose unequivocally of his contention.

The holding in *McDonald* is that the First Amendment right to petition does not immunize libels expressed in the petition to any greater degree than the First Amendment protects any other expression. 105 S. Ct. at 2791. The recent and principal precedent for that holding was *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161 (1983), a case quoted and cited as controlling in *McDonald* but omitted by Margoles from his petition. The opinion of this Court in *Bill Johnson's* stated clearly that suits based on insubstantial claims are not within the scope of First Amendment protection:

> "Just as false statements are not immunized by the First Amendment right to freedom of speech (citations omitted), baseless litigation is not immunized by the First Amendment right to petition."

103 S. Ct. at 2170.

The imposition of damages and costs by the Court of Appeals in this case was proper and in accordance with Fed. R. App. P. 38. Margoles' appeal was frivolous, and an undue prolongation of already over-extended litigation.

Margoles has carried on a campaign in the courts for two decades since his criminal convictions and the refusal of the Wisconsin Board of Medical Examiners to relicense him. His approach has remained constant and is evidenced again in this case—he has been unwilling to accept the finality of judgments, and continues to litigate and perpetuate litigation, with repeated charges of denial of due process, to the harassment of those who have been involved as his adverse parties, their agents, and the courts.

In 1969, after the Wisconsin Board of Medical Examiners denied his relicensure, he appealed unsuccessfully to the Circuit Court of Wisconsin, and then to the Supreme Court of Wisconsin. *Margoles v. Wisconsin State*

Board of Medical Examiners, 47 Wis. 2d 499, 177 N.W.2d 353 (1970). He claimed, among other things, that he had been denied due process. The Wisconsin Supreme Court disagreed, ruling due process had been fully accorded. It said that competent testimony supported the finding of Dr. Margoles' "inability to accept his own guilt and his placing of blame on the sentencing judge and governmental agencies." 47 Wis. 2d at 514, 177 N.W.2d at 361 (1970).

Six days after that decision, Margoles filed civil suit against the Board, Board members, its private investigator, and its lawyer, charging them with conspiracy, defamation and denial of civil rights. That litigation was in the courts from 1970 to 1981. *Margoles v. Ross*, 67 F.R.D. 666 (W.D. Wis. 1975), and *Margoles v. Board of Medical Examiners*, 446 F.Supp. 959 (W.D. Wis.), *aff'd* and *rev.*, 588 F.2d 832 (7th Cir. 1978); *Margoles v. Tormey*, 643 F.2d 1292 (7th Cir.), *cert. denied*, 452 U.S. 939 (1981).

Likewise in this case, commenced in 1972, Margoles is unwilling to accept the finality of the judgment entered against him eleven years ago and seeks to blame others for the result. In 1980, after he had lost this case in 1976 before Judge Warren, had appealed unsuccessfully without any reference to Judge Warren's alleged partiality, had been denied a rehearing, and had been denied certiorari by this Court, he collaterally attacked the judgment on the ground that he had been denied due process, on "evidence" which largely had been in his possession when judgment was entered in 1976. He lost again, this time before a different trial judge, Judge Evans, and again continued unsuccessfully with an appeal and a certiorari petition to this Court. Three years later, in 1984, on the basis of the documents he already had lost on, plus a few added documents the Court of Appeals has called "patently innocuous," he moved once more, attacked the judge

who originally decided the case and defendants' counsel, and claimed that Judge Evans, who had ruled against him on the second 60(b) motion, should recuse himself. Notwithstanding Judge Evans' findings that Margoles' position on the facts was "incredible" and "insufficient" (A-18 - 19), Margoles appealed once more and even requested a rehearing from a Court of Appeals which had found his evidence to be "patently innocuous" and "totally inconclusive" (A-9) and his position to be "woefully inadequate," "groundless," and "totally unfounded." (A-11)

The Respondents have been put to a great deal of expense by Margoles over a 16 year period. After being taken to the Court of Appeals for the District of Columbia Circuit in the predecessor case in 1971-1972 on a jurisdictional issue, they have had the burden of going back to court and through the appellate process all the way to this Court three times in this case to defend a judgment they received in January, 1976.

There were ample grounds for the modest costs awarded by the Court of Appeals to the Respondents on this latest appeal. Indeed, there would be ample grounds for an award of double costs here. Supreme Court Rule 50.7. The Petitioner's repeated attempts to reopen this case (a slander case involving alleged telephone calls in 1970) abuse the judicial process.

If parties could vacate judgments as Petitioner seeks here, by making extravagant charges of denial of due process on the basis of suspicion, speculation and unwarranted inferences, our system of resolving disputes in the courts would suffer severely. As the district court said, there "must be finality somewhere in the system, and that point has now been passed." (A-19) Requiring Margoles to pay a small fraction of the expenses he has unreasonably caused the Respondents after that point was passed is reasonable and is in conformance with the federal appellate rules.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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